COMMONWEALTH OF KENTUCKY
IN SUPREME COURT
No. 15-SC-000711-D
(Appellate Case No. 14-CI-00361
McCracken County Circuit Court
Trial Case No. 11-CI-00316)

PADUCAH INDEPENDENT SCHOOL DISTRICT
APPELLANT

v.

PUTNAM & SONS, LLC
an Oregon Limited Liability Company
APPELLEE

BRIEF OF APPELLEE, PUTNAM & SONS, LLC

Dan Biersdorf, Esq.
Biersdorf & Associates, P.A.
150 S. Fifth Street – Suite 3100
Minneapolis, MN 55402
612.339.7242
Counsel for Appellee
Admitted Pro Hac Vice

Samuel J. Wright, Esq.
Farmer & Wright, PLLC
P.O. Box 7766, 4975 Alben Barkley Drive, Suite 1
Paducah, Kentucky 42002-7766
Co-counsel for Appellee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that 10 copies of the foregoing document were served for filing by Federal Express on August 9th, 2016, and that, on the same date, a true and correct copy of the foregoing document was served by Federal Express on counsel for Appellant, co-counsel for Appellee, the trial judge, and the clerks of court at the following addresses: **Nicholas M. Holland**, Whitlow, Roberts, Houston, & Straub PLLC, PO BOX 995, Paducah, KY 42002-0995; **Samuel J. Wright**, Farmer & Wright, PLLC, P.O. Box 7766, 4975 Alben Barkley Drive, Suite 1, Paducah, Kentucky 42002-7766; **Hon. Craig Z. Clymer**, McCracken County Courthouse, 301 S. 6th St., Paducah, KY 42002; **Clerk of Court, McCracken County Courthouse**, 301 S. 6th St., Paducah, KY 42002; **Clerk of Court, Kentucky Court of Appeals**, 300 Democrat Drive, Frankfort, KY 40601-9229.

Dan Biersdorf - *Admitted pro hac vice*

STATEMENT CONCERNING ORAL ARGUMENT

There is no valid reason to limit argument before this Court on issues implicating the constitutional guarantees of the constitutions of both the Commonwealth and the federal government. Appellee requests oral argument unless the Court is considering summarily affirming the Court of Appeals.

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PRELIMINARY STATEMENT

This action stems from the Commonwealth's awesome power of eminent domain to seize private property against the will of its owners. In this case, that power was delegated to the Paducah Independent School District ("District"). While Appellee ("Putnam") does not dispute that the District has this awesome power, that power is not limitless.

First, the power is limited through the federal and Commonwealth constitutions, both of which require the payment of just compensation for such a seizure. Second, through the decades, the courts have developed a "rulebook" of laws to ensure that the compensation paid when condemnors exercise their power is truly just. This case is about ensuring that the courts and the Commonwealth actually play by a just rulebook.

With faith in government and institutions at all-time lows, it has never been more important to require that government operate on a level playing field with the governed. With this case, this Court has the opportunity to temper this awesome power, and to ensure that the private property rights of the citizens are given the proper protection.

Before May 19, 2011, Putnam owned 11 acres of land at Jackson and 31st St. in Paducah, Kentucky, broken into three parcels ("Subject Property"). The District wanted to acquire one of these three parcels, a 2.79-acre parcel on the west side of 31st Street ("Part Taken"). The District and Putnam could not come to terms on a deal for the District to purchase the Part Taken. So, on May 19, 2011, the District seized the Part Taken against Putnam's will through condemnation. This date is the "date of taking."

The two remaining parcels ("Remainder"), on the east side of 31st Street, housed a huge, heavy industrial improvement, formerly used as a Modine manufacturing facility.

Historically, Modine used the Part Taken for parking. By the 1980's Modine had ceased manufacturing. Putnam then repurposed the Subject Property for warehousing. Putnam then used the Part Taken (a secure, fenced lot) for large semi-trucks to drop off and pick up freight. At the time of the condemnation, none of Putnam's warehouse tenants were using the Part Taken.

When there is a partial taking (e.g. one parcel of three, like here) there are two possible ways to calculate just compensation. Typically, under Kentucky law, just compensation for this partial taking would require the Court to determine the before value of the entire Subject Property and the after value of the Remainder, with the difference equaling just compensation under the federal and Commonwealth constitutions. This is the typical method because by calculating the value of the remaining property after the taking, the just compensation also includes any diminution in value to the remainder property caused by the taking.

The second possible method is to calculate the value of only the condemned parcel without resort to valuing the entire, unified property. Because this method cannot capture any diminution of value to the remainder, it is the exception to the rule. It may only be used where there is evidence that the parcels are not economically integrated, such that there cannot be any diminution of value to the remainder caused by the taking.

The District contended that this was one of those exceptions to the typical rule. At trial, the District presented a valuation of the Part Taken only. The District contended that the Part Taken should be analyzed as an independent parcel. Yet, the District did not present the typical before-and-after analysis to justify its position. That is, the District presented no evidence showing that the damages under the before-and-after method were

less than or equal to the damages under the Part Taken method. If the before-and-after method showed a greater damage number, it would be proof that the parcels *were* economically linked, and the Part Taken method would be inappropriate and a deprivation of just compensation. Yet, the District presented no evidence on the value of the Subject Property, as a whole, at all. Putnam, on the other hand, presented valuation evidence analyzing the taking both in the traditional before-and-after analysis, and evidence of the Part Taken analyzed as an independent unit.

The trial court agreed with the District and concluded that the Part Taken could be valued in isolation, as an independent economic unit. But the Court of Appeals held that, in making this determination, the trial court improperly focused on one factor, the present use by one tenant, while ignoring all other pertinent inquiries (e.g. historical use, highest and best use). The Court of Appeals holding on this issue is consistent with prior Kentucky law, its sister state courts, the Federal Circuits, and the U.S. Supreme Court. This Court should affirm the Court of Appeals holding on this issue.

After deciding the Part Taken could be analyzed alone, the trial court completely rejected the District's valuation evidence, finding it was flawed in many substantive respects. But when it came to evaluating Putnam's evidence on the value of the Part Taken, the trial court rejected that too. In rejecting Putnam's Part Taken valuation, however, the trial court did not rely on evidence of substantive flaws. Instead, the trial court rejected Putnam's Part Taken evidence based on its own "general knowledge," with no explanation. The trial court made this "general knowledge" rejection supposedly based on a trial court's ability to safeguard against unsupported jury verdicts (despite there being no jury). This was an abuse of discretion this Court must correct.

Now faced with a lack of evidence, the trial court tried to fashion its own remedy. It used a 2002 deed of the Subject Property to set the before value, and an actual sale of the Remainder (shortly after the date of taking) to set the after value. But this approach was flawed from the start. The Court of Appeals held that, once the trial court decided it should analyze the Part Taken alone, it could not then use the traditional before-and-after method. While this should be self-evident through a consistent application of logic, it is also the law in several other states. Moreover, the Court of Appeals noted that the 2002 deed was an improper basis to set the before value because 1) it was executed nine years before the date of taking; 2) it was between related parties; and 3) no one testified how it applied to the value of the Subject Property on the date of taking. All of these points are supported by pre-existing Kentucky law, and the law of its sister courts. In short, the Court of Appeals should be affirmed in all respects to clarify Kentucky law and to bring it into more explicit harmony with the common law nationally.

The actors in this drama are of secondary importance. No one is arguing a school district does not have the right to exercise the state's extraordinary power of eminent domain to condemn and seize private property. No one is arguing that schools are not important. But just compensation under the constitutions of the federal government and the Commonwealth and the rights of private citizens in Kentucky are equally important.

The actors having been removed from the stage, we are now at the point where this Court's actions implicate the rights of every citizen of Kentucky in every eminent domain case to come. This case involves the constitutional guarantee of just compensation. In this context, "good enough" is not constitutionally adequate. This Court

must "get it right" to protect the property rights of not only Mr. Putnam, but also of every Kentuckian from here forward.

"Of all the terms used in the Taking Clause, 'just compensation' has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires 'a full and perfect equivalent for the property taken.'" *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 150, 98 S. Ct. 2646, 2672, 57 L. Ed. 2d 631 (1978) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326, 13 S. Ct. 622, 626, 37 L. Ed. 463 (1893)). The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken. *United States v. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276, 279, 87 L.Ed. 336 (1943); *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934).

To affect justice, courts charged with determining just compensation for private property seized against the owner's will must strictly comply with the law. Approximations and *ad hoc* remedies do not suffice. In this case, the trial court's cavalier (and unexplained and unsupported) rejection of evidence and fashioning of a logically inconsistent and illegal determination of damages does not comport with the level of justice appropriate for destroying private property rights. Putnam does not ask for compensation in excess of fair market value. Putnam merely asks that the Court follow the law in determining just compensation.

The trial court, perhaps too concerned with the actors, attempted to fashion its own remedy to replace just compensation. The Court of Appeals, rightly, found that the trial court's illogical, unsupported remedy was not the equivalent of just compensation. This Court should take the next step and find that illogical, unsupported remedies can

never form the basis of just compensation. Compensation in this case, and every case, is inadequate if it is not also "just."

COUNTER-STATEMENT OF THE CASE

The District exercised its delegated power of eminent domain to condemn a 2.79 acre parcel of land formerly owned by Putnam.[1] Before May 19, 2011, Putnam owned 11 acres of land at Jackson and 31st St. in Paducah, Kentucky, broken into three parcels ("Subject Property").[2] Putnam bought this property in 1982.[3] Since then, Putnam used it for light manufacturing and warehousing.[4] On May 19, 2011, the District acquired one of the three parcels for a school.[5] The acquired parcel ("Part Taken") was a 2.79-acre parcel on the west side of 31st Street, which was used for open storage and parking transport vehicles in support of the other two parcels under the highest and best use for the Subject Property. The Part Taken was graveled and surrounded by a locking chain-link fence.

The two other parcels were on the east side of 31st Street ("Remainder"). The Remainder contained approximately 150,000 square feet of gross building area.[6] Most of the building area (130,000 square feet) was in one large building formerly used as a manufacturing plant.[7] It was built with heavy construction materials,[8] including a 12-inch thick reinforced concrete floor,[9] heavy masonry walls, and a heavy steel support system

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[1] R. 1-5.
[2] Def. Ex. 2 at 17-18.
[3] Def. Ex. 2 at 17.
[4] Def. Ex. 2 at 17.
[5] R. 17-20.
[6] Def. Ex. 2 at 22-29.
[7] Def. Ex. 2 at 25.
[8] Tr. 71:1-71:23. All references to "Tr." herein refer to the full transcript of the trial in this matter held on July 29, 2014 and included in the record by designation.
[9] Tr. 71:1-71:5.

for the roof.[10] As of May 19, 2011, the roof surface needed significant repair[11] to continue using the building for its highest and best use of warehousing.[12]

The purpose of the trial was to determine the amount of just compensation owed to Putnam due to its loss of the Part Taken. At trial, the parties presented evidence of the amount of just compensation owed through two appraisal witnesses. The District utilized the opinion of George Sirk ("Sirk"). Putnam relied upon the opinion of Otto Spence ("Spence").

Spence's appraisal provided just compensation utilizing two, distinct methods. The first method was based upon a before-and-after analysis. Under this analysis, just compensation equals the value of the entire Subject Property immediately before the taking minus the value of the Remainder immediately after the taking.

Spence determined the highest and best use for the Subject Property before the taking to be a warehousing facility with adequate open storage area (on the Part Taken) to accommodate the delivery and exchange of materials with large semi-trailer trucks. Spence stated that the heavy construction of the former manufacturing plant made the improvements ideally suited for warehousing purposes involving large semi-trailer trucks because of the generous amount of land associated with the improvements.[13]

The District attempts to testify in its statement of the case that the Part Taken and the Remainder could not be considered unified without a repaired roof. Br. at 4. No such evidence appears of record, nor does the District cite to any. The Court can disregard the District's attempt to introduce evidence into the record at this late stage.

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[10] Ex. 2 at 25.
[11] Ex. 2 at 25.
[12] Tr. 72:22-74:15.
[13] Tr. 56:20-58:4; 72:22-74:15.

While Spence included both a sales comparison approach and an income approach in his appraisal, the sales comparison approach was most reliable for determining the before and after values for the Subject Property.[14] In a sales comparison approach, the appraiser selects properties that are as comparable as possible to the subject. Spence testified that, for his comparable sales, he identified sales from locations that were similar to that of the Subject Property,[15] i.e., had good access to the interstate highway system.[16] They also had ample land for semi-truck distribution.

After contacting many brokers and appraisers in western Kentucky,[17] Spence identified 12 sales that he considered worthy of comparison to the Subject Property.[18] Spence testified that, as part of his inspection of the Subject Property, he walked on the roof of the main building[19] and determined that the roof surface needed replacement to continue as a warehousing facility. Spence testified that, unlike the Subject Property, all of his comparable sales had functional roof surfaces that did not need immediate replacement.[20]

Spence determined a unitary value for the subject property of $10 per square foot of gross building area,[21] assuming the roof was repaired, after making adjustments to all of his comparable sales.[22] This equaled a total value for the subject property of $1,500,000. Because the adjustments for the comparable sales did not factor in the poor roof on the Subject Property, he testified that the indicated value for the Subject Property

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[14] Tr. 77:6-77:12, 94:24-95:2. 109:24-110:2.
[15] Tr. 78:10-79:12.
[16] Tr. 79:13-82:9.
[17] Tr. 83:17-84:7.
[18] Tr. 77:13-77:24, 79:16-80:4.
[19] Tr. 87:19-88:1.
[20] Tr. 89:2-89:16.
[21] Tr. 86:18-87:5.
[22] Tr. 91:18-91:25.

($1,500,000) reflected a value for the Subject Property with a repaired roof.[23] Spence deducted $400,000 from the indicated value for the Subject Property to reflect its "as is" condition of needing a new roof surface.[24] This deduction reflected the amount of money that the market would spend to fix the roof and make the Subject Property comparable to his comparables. Spence's value before acquisition was thus $1,100,000 (i.e. $1,500,000 - $400,000 = $1,100,000).[25]

Spence also analyzed the Remainder's highest and best use as part of his determination of the Remainder's value. Because the improvements on the Remainder remained unchanged from what existed on the Subject Property before the taking, Spence testified that the highest and best use for the Remainder would remain warehousing purposes.[26] But the loss of the Part Taken meant that the Remainder no longer had enough land area for warehousing uses that involved large semi-trailer trucks.[27]

The loss of the Part Taken meant the Remainder could only accommodate storage for smaller sized trucks, because of the lower ratio of land surface area to building area for transfer and maneuverability of trucks.[28] Spence identified a database of warehousing properties with lower amounts of available open area for storage and truck maneuverability to determine the market value for the Remainder.[29] After adjusting those comparable sales, Spence concluded that the value for the Remainder was $750,000 based on $5 per square foot of gross building area.[30]

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[23] Tr. 92:24-93:11.
[24] Tr. 90:6-91:17.
[25] Tr. 92:9-92:23, 93:15-94:12.
[26] Tr. 98:22-99:20.
[27] Tr. 99:21-101:7.
[28] Tr. 99:21-105:12.
[29] Tr. 99:21-108:1.
[30] Tr. 102:15-102:18, Tr. 108:2-108:19.

Like Spence's value before the taking, the $750,000 value for the Remainder reflected a functioning roof. Because the Remainder did not have a functioning roof on the date of taking, Spence also reduced the value for the Remainder by the same $400,000 that he utilized in determining an "as is" value for the Subject Property before the taking,[31] i.e the value for the Remainder after the taking was $350,000. Using this remainder value, just compensation under the before-and-after method is $750,000 ($1,100,000 - $350,000 = $750,000).

Shortly after the date of taking, Putnam listed the Remainder for sale. Several months later, it sold for $435,000.[32] If this sale is used as the after value for the Remainder, just compensation is $665,000 ($1,100,000 - $435,000 = $665,000).[33]

Nine years before the date of taking, Tom Putnam acquired half of the interest in the Subject Property from his father. His purchase price was based on an appraisal that valued the entire Subject Property at $1,100,000. Although Spence did not rely on this to determine his before value, he did note that that appraisal corroborated his value conclusion.

As part of his appraisal report, Spence used a second method to calculate just compensation. This method determined a value for the Part Taken by itself.[34] Because the Part Taken had no building improvements, Spence analyzed its highest and best use as vacant.[35] An important consideration for Spence was its location just off Jackson Street,

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[31] Tr. 108:20-109:9.
[32] This sales price was only $85,000 more than the amount Spence opined was the value of the Remainder.
[33] Under this method, the value of the Remainder is deducted from the value of the entire Subject Property with the result equaling just compensation. *See* Tr. 98:15-98:21, 111:2-111:17.
[34] Tr. 111:18-112:8.
[35] Tr. 112:9-112:18.

where the traffic count is 19,000 cars per day.[36] He noted that this made this stretch of Jackson the second most prominent commercial corridor in Paducah.

Spence noted that the location of the Part Taken was midway between two major hospitals that he believed would generate commercial activity for the Part Taken.[37] These two hospitals were the first- and third-largest employers in Paducah.[38] This information contributed to his conclusion that the highest and best use for the Part Taken was for commercial/medical office use.[39]

Spence utilized seven sales in his sales comparison approach to determine the value for the Part Taken.[40] Spence noted these properties, which had a highest and best use for commercial use and were at locations with good accessibility and/or visibility to a major thoroughfare. Spence's highest and best use conclusion for the Part Taken was supported by redevelopment plans for the Remainder after it was sold and the improvements demolished.[41] The buyer of the Remainder then told Spence that a redevelopment plan to create a subdivision devoted to medical office uses was proceeding through the City approval process.[42]

After focusing his analysis on three of his comparable sales, two of which were in very close proximity to the Part Taken,[43] Spence concluded that the value of the part taken should be $608,000, or $5 per square foot of land area.[44] Upon objection of the District, the court precluded Spence from testifying about the offering price to be used on

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[36] Tr. 136:11-136:24.
[37] Tr. 113:7-117:16.
[38] *Id.*
[39] Tr. 62:1-64:20, 112:24-113:6.
[40] Tr. 117:17-119:3.
[41] Tr. 183:20-184:17.
[42] *Id.*
[43] Tr. 119:10-120:24.
[44] Tr. 126:11-126:22.

the lots being created from the Remainder.[45] Putnam then made an offer of proof that Spence would have testified that the lots directly across the street from the Part Taken were going to be offered at the same $5 per square foot that he concluded as the value of the Part Taken.[46]

According to Spence, $608,000 represents just compensation for Putnam, based upon an analysis of the Part Taken alone. Because the just compensation indicated by the before-and-after method ($750,000) produced a higher amount than the Part Taken method ($608,000), Spence stated that the compensation should be the amount under the before-and-after method.[47]

The court concluded that the Part Taken was not needed to support the highest and best use of the Remainder.[48] Because the court concluded that the Subject Property as a whole was not the focus of the just compensation inquiry, the court rejected the before-and-after method of determining just compensation that is mandated by Kentucky law.[49]

Spence testified that the Part Taken was necessary to support the highest and best use of the Subject Property.[50] The District's appraisal did not consider the situation where the Part Taken and the Remainder would be valued as one larger parcel before the taking and a smaller parcel after.[51] It only valued the Part Taken and provided no valuation analysis for the Remainder.[52] It could not (and did not) express an opinion as to whether

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[45] Tr. 184:11-198:12.
[46] Tr. 198:13-200:23.
[47] Tr. 126-:11-127:20. Putnam also conceded that, using Spence's before value ($1,100,000) and the actual sale of the Remainder ($435,000) would produce an accurate and proper determination of just compensation ($665,000).
[48] R. 237-248, Conclusions of Law ¶¶ 4-5.
[49] R. 237-248, Conclusions of Law ¶ 5.
[50] Tr. 85:20-86:17.
[51] R. 237-248, Findings of Fact ¶ 21.
[52] *Id.* See also, Pl. Ex. 1, Appraisal of George Sirk.

the Part Taken was needed to support the highest and best use of the Subject Property. So, the only evidence on the record regarding the highest and best use for the entire Subject Property came from Putnam's witness, Spence.

At trial, the District introduced the evidence of the sale of the Remainder. In response, when Spence attempted to further explain the motivations of this buyer and her intended offering price for the lots, the District objected because it did not have previous notice of this evidence, and because the asking prices for the lots contained in the documents were speculative. The court sustained the objection on both grounds even though the District was the party who introduced the sale into evidence. [53]

Without explanation, the court disregarded and rejected Spence's value of the Part Taken, "[b]ased upon the Court's general knowledge and experience..."[54] The court also rejected Sirk's value conclusion because Sirk relied on non-sales, non-arm's length sales, and sales that did not share the Subject Property's highest and best use.[55] There was thus no credible evidence on the record rebutting Spence's value of the Part Taken.

Despite rejecting the before-and-after method, the trial court used the before-and-after method anyway. The trial court relied on the father-son transfer of the Subject Property in 2002, nine years before the date of taking.[56] Although Putnam testified that this deed was only for the half of the property he did not already own (his father and Putnam were partners), the trial court used the deed to set the value of the entire Subject Property at $550,000. The trial court then used the sale of Remainder to set the value of the Remainder ($435,000). The trial court concluded that the difference between (half of)

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[53] Tr. 184:11-198:12.
[54] R. 237-248, Findings of Fact ¶ 11
[55] R. 237-248, Findings of Fact ¶ 11.
[56] R. 237-248, Conclusions of Law ¶ 12.

the Subject Property in 2002 and the Remainder was just compensation (i.e. $550,000 - $435,000 = $115,000).

There was no evidence on the record to support the finding that this 2002 transaction reflected the market value of the Subject Property in 2011.[57] The only evidence of the before value of the Subject Property on the date of taking was Spence's opinion. After rejecting the before-and-after methodology, it was legal error for the court to rely on that methodology anyway and ignore the before-and-after values presented on the record.

Putnam appealed the trial court's decision to the Kentucky Court of Appeals. After reviewing the trial court's decision and the entire record, the Court of Appeals made the following findings:

1. "Putnam offered proof from Spence that the value of its properties as a whole was permanently diminished by the taking."
2. "The District failed to rebut Spence's testimony [regarding the diminution of value of the Remainder] with any expert opinion of its own."
3. "Putnam made a *prima facie* showing, which the District failed to rebut, that the taking caused it to suffer a permanent injury as related to its remaining property."
4. "In analyzing the unity of use/purpose question, the circuit court considered only the present use of the property by [a] short-term tenant."

[57] Spence only referenced the appraisal of $1,100,000 in the 2002 transaction. Spence did not rely on the 2002 transfer for his before-taking value. He merely showed the accompanying appraisal as market corroboration.

5. "[T]he circuit court failed to properly analyze the unity of use/purpose issue....The circuit court erred in limiting its analysis of use to only the current use by Wagner, Putnam's most recent tenant."
6. "[Spence's] opinions...are supported by research and market data. They have some factual underpinning and basis."
7. "Putnam presented evidence of best use that was more than mere speculation."
8. "[E]ven though the circuit court stated in its opinion that it did not believe the Subject Property was unified, it nevertheless valued the property as if it were unified. This is somewhat perplexing. If the circuit court believed that the Subject Property was not unified with the remaining property, it should have valued it without reference to the remaining tract and without any consideration of the property as a whole."
9. "[O]nce the circuit court rejected the unity approach, the Large Tract became irrelevant."
10. "There was no testimony that [the 2002 interparty deed] represented the actual fair market value of the property in 2002....[A] prior transfer between interrelated companies of a three parcel tract is [not] competent or reliable evidence of the present fair market value of a single parcel nine years later."

The foregoing statements are those of a neutral arbiter. The Court of Appeals found that the trial court had made multiple errors requiring reversal of the judgment. The District petitioned to this Court for review, which this Court granted.

ARGUMENT

In a condemnation action, before a judge or jury can assess compensation for a taking and damages to a property, the factfinder must determine: "what is the property?" Before we can accurately address this topic, we must jettison the District's incorrect formulation of the record. The District contends that the Court of Appeals committed reversible error when it held that "Putnam's application of the highest and best use test was appropriate and should have been more fully considered in the trial court's analysis under the unity rule." The District's statement reveals its lack of understanding for how the unity rule is incorporated in the highest and best use analysis. The Court of Appeals' holding was not specific to Putnam's application of highest and best use. Rather, the Court of Appeals merely held that the unity of use required by the unity rule is to be integrated with concepts of highest and best use, and, like highest and best use, is not limited to the current use of the property. Appendix Ex. 1 at 14, *hereinafter* "Opinion".

To fully understand the unity of use issue and its role in this case, some background is in order.

I. The Unity Rule.

As part of the Commonwealth's Constitution, the Kentucky Bill of Rights guarantees a payment of just compensation when the State or its municipalities exercise the power of eminent domain to seize private property. Ky. Const. § 13. Ordinarily, just compensation is measured as the market value of the total parcel immediately before the condemnation, and the market value of any remaining property immediately after the condemnation. *Commw., Dep't of Highways v. Tyree*, 365 S.W.2d 472, 477 (Ky. 1963).

This condemnation of the Subject Property obviously affects a smaller portion of a larger parcel that, undisputedly, was historically used as one unit. Typically, this sort of unified, historic use is the proper focus for valuation. See *Commw., Dep't of Highways v. Dennis*, 409 S.W.2d 292, 293 (Ky. 1966) ("Ordinarily, two or more parcels of land constitute one tract for the purpose of determining its value when they are contiguous and are united in use and ownership.").

In this case, the center of the District's argument is that, despite the general rule of *Dennis* and the Subject Property's historically unified use, the Part Taken should be valued in isolation, and without reference to the Remainder. In other words, the District would have to show that these historically unified parcels were no longer unified for purposes of valuation on the date of taking. See *Commw., Dep't of Highways v. Raybourn*, 359 S.W.2d 611, 612 (Ky. 1962) (Commonwealth has burden to show lack of unity where parcels are historically united).

In eminent domain, the valuation principle where multiple, smaller parcels are valued as one larger, integrated parcel is sometimes called the "unity rule." The unity rule "permits two or more parcels of land to be deemed one tract, provided that the tracts are contiguous...and that they are united in use and in ownership." *Nichols on Eminent Domain* § G9A.04[3][b]. The unity rule "arises along with a claim for severance damages following condemnation of less than an entire property." *Nichols* § G9A.04[3][b]. Severance damages are those damages resulting from a taking of property that are attributable to the diminution of value in the property left remaining after the taking. The Appraisal Institute, *The Dictionary of Real Estate Appraisal* 263 (4th ed. 2002). The unity rule is "based on fairness and equity." *Jones v. Commw., Dep't of Highways*, 413

S.W.2d 65, 67 (Ky. 1967). The unity rule thus allows a condemnee to claim severance damages applicable to the pieces of the unified, larger parcel that are not condemned.

The District contends that the historically united Part Taken and Remainder have somehow changed in use so drastically that they must now be valued separately and without reference to each other. Here, the contiguity and ownership are not in dispute. The dispute between the parties centers on the final element, unity of use. The issue, then, is the correct legal method for evaluating unity of use.

In discussing the "use" element, the Court of Appeals determined that the trial court erred in considering "only the current use by...Putnam's most recent tenant." Opinion at 14. The Court of Appeals held that this myopic approach to determining unity of use was legal error. The Court of Appeals' holding is appropriate because it adheres to common sense and logic, comports with appraisal practice and literature, and – to the extent that it is novel – harmonizes Kentucky law with its sister states and the Federal Circuits.

A. To properly evaluate "unity of use," a trial court must consider the reasonable probability that multiple tracts of property could or would be used together, which necessarily goes beyond examining current use.

A determination of unity of use does not "necessarily depend upon the uses to which the property was being devoted at the time [of the taking]." *Calvert v. City of Denton*, 375 S.W.2d 522, 524 (Tex. Civ. App. 1964). Instead of focusing solely on current use, the majority of courts have adopted the **reasonably probable** standard for unity of use as the appropriate legal standard.[58] "[T]he correct standard for unity of use is

[58] The undersigned is unaware of any jurisdiction in the United States that has adopted a contrary or differing standard.

whether integrated use of untaken and taken parcels is reasonably foreseeable." *Greene v. D.C.*, 56 A.3d 1170, 1178 (D.C. 2012).

Reasonable forecasting necessarily involves examination of more than just current use. Reasonable foreseeability (or "probability") is likewise an element of highest and best use. The Appraisal Institute, *The Appraisal of Real Estate* 332-33 (14th ed. 2013). Under eminent domain law, highest and best use can be something other than current use *Big Rivers Elec. Corp. v. Barnes*, 147 S.W.3d 753 (Ky. 2004). So, to correctly determine whether two properties are unified – and thus share a unified highest and best use – an appraiser (and a court) must consider more than just present, actual use.

Beyond being logical and consistent with concepts of highest and best use, the Court of Appeals' opinion is not novel. To the extent it is novel locally, the Court of Appeals' opinion simply and explicitly brings Kentucky into compliance with its sister state courts and the Federal Circuits.

In addressing this issue, the Fourth Circuit has held that "the pivotal question is whether there is a *potential* unity of use between the taken land and the retained land." *Washington Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cty., Md.*, 691 F.2d 702, 704-05 (4th Cir. 1982) [emphasis added]. Obviously, *potential* unity involves examination of more than just *actual* unity; it necessarily involves concepts such as highest and best use[59] (which, in turn, deals with reasonably probable use). The First

[59] The "highest and best use" of a property is "the reasonably probable use of property that results in the highest value." The Appraisal of Real Estate, *supra* at 332.

and Third Circuits have made similar holdings.[60] Even the U.S. Supreme Court has held that the "reasonable probability" test applies in determining whether a condemned parcel should be valued as combined with other tracts. *U. S. ex rel. & for Use of Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275-76, 63 S. Ct. 1047, 1053, 87 L. Ed. 1390 (U.S. 1943).[61]

This "reasonable probability" standard for unity of use is not unique to the federal courts. It is also the law in New York,[62] Texas,[63] California,[64] North Dakota,[65] New Jersey,[66] Idaho,[67] South Dakota,[68] and Massachusetts.[69] The Court of Appeals' holding

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[60] See, *United States v. 27.93 Acres of Land, More or Less, Situate in Cumberland Cty., Commw. of Pa. Tract No. 364-07*, 924 F.2d 506, 515 (3d Cir. 1991) ("To receive...severance damages, the landowner must show that there is a reasonable probability of the lands in question being combined"); *Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir. 1944) ("tracts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use or even if the *possibility* of their being so combined in use in the reasonably near future" [emphasis added]).

[61] This suggests that Kentucky could not adopt a lesser standard for evaluating unity of use without running afoul of the Fifth Amendment's takings clause.

[62] See e.g., *Vill. of Port Chester v. Bologna*, 95 A.D.3d 895, 896-97, 943 N.Y.S.2d 575, 577-78 (2d Dep't 2012) (in determining unity of use, court may determine intent of owners and prospective uses).

[63] *McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 222 S.W.3d 878, 883 (Tex. App. 2007) ("Property has a unity of use if the tracts are devoted to an integrated unitary use or if the possibility of their being so combined for a unified use in the reasonably near future is such as to affect market value.").

[64] *City of San Diego v. Neumann*, 6 Cal. 4th 738, 741, 863 P.2d 725, 727 (1993) ("separate legal parcels may be aggregated and considered as one 'larger parcel' when the owner establishes a reasonable probability that all of the contiguous commonly owned lots will be available for development or use as an integrated economic unit in the reasonably foreseeable future").

[65] *City of Hazelton v. Daugherty*, 275 N.W.2d 624, 629 (N.D. 1979) ("The adaptation of the land for purposes other than those to which it is put at the time of taking may be considered in the award of severance damages...").

[66] *State by Com'r of Transp. v. Bakers Basin Realty Co.*, 138 N.J. Super. 33, 42, 350 A.2d 236, 241 (App. Div. 1975) *aff'd*, 74 N.J. 103, 376 A.2d 1189 (1977) (to receive severance damages "there must be a reasonable probability of the lands in question being combined with other tracts for a particular purpose").

[67] *State ex rel. Symms v. City of Mountain Home*, 94 Idaho 528, 532, 493 P.2d 387, 391 (1972) ("it is not the identity of uses of the condemned and remaining land which is determinative; what is significant is the dependency of the value of the remaining land upon its use in conjunction with the condemned land").

brings Kentucky in line with its sister courts and the Federal Circuits. This Court should use this opportunity to bring Kentucky into explicit harmony with these jurisdictions. After adopting the obvious logic that unity of use involves an examination of reasonable probabilities (which necessarily involves more than just current use), the issue then becomes: what factors other than current use should a court consider to make a reasonably probable unity of use determination?

B. The proper method of determining unity of use involves a multi-factor analysis anchored by highest and best use, but also includes examining the intent of the owner, the adaptability of the property, the dependence between parcels, zoning, the appearance of the land, and the actual use of the land.

Learned journals support the use of multi-factor determination of unity of use that is anchored by highest and best use. In a joint American Law Institute and American Bar Association article, its authors stated that, in determining whether there is unity of use, "[t]he present use of the property is not the only use that deserves factual scrutiny." H. Dixon Montague, *The Role of the "Separate Economic Unit" in the Determination of Just Compensation,* Eminent Domain and Land Valuation Litigation SG059 ALI-ABA 129, 141 (2002). Although favoring a multi-factor analysis, the authors believed that highest and best use was the paramount factor, noting that the determination of unity of use should be "guided substantially by the property's highest and best use in the market as of the relevant date of inquiry." *Id.* at 141-42.

In Florida, there is a presumption that contiguous tracts are unified. *Div. of Admin., State Dep't of Transp. v. Jirik*, 471 So. 2d 549, 553 (Fla. Dist. Ct. App. 1985)

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[68] *Hurley v. State*, 82 S.D. 156, 164-65, 143 N.W.2d 722, 727 (1966) (prospective use and highest and best use are valid considerations in determining unity of use).

[69] *Valley Paper Co. v. Holyoke Hous. Auth.*, 346 Mass. 561, 566, 194 N.E.2d 700, 704 (1963) (unity of use must be based on reasonable probability of use).

approved sub nom., *Dep't of Transp., Div. of Admin. v. Jirik*, 498 So. 2d 1253 (Fla. 1986). Kentucky employs a similar presumption. *Dennis*, 409 S.W.2d at 293; *Raybourn*, 359 S.W.2d at 612. But should this presumption be put at issue, the Florida courts use the following factors to determine unity of use: the intent of the owner, the adaptability of the property, the dependence between parcels, the highest and best use of the property, zoning, the appearance of the land, and finally, the actual use of the land. *Jirik*, 471 So. 2d at 554-55.

The Florida approach mimics the real world real estate market, where prospective buyers and sellers consider more than just the current use of the property. Here, the Court of Appeals adopted some of these "real world" factors,[70] and noted that reliance solely on actual use was legally erroneous. The District's lament, that any analysis beyond current use might be "limitless," is not only contrary to concepts of highest and best use, but it is also conclusory and undeveloped. The *Jirik* factors, as the broadest example, are well within the ability of any court or jury to analyze. As to the evidence speaking to those factors, the District offers no reasoning as to why a trial court could not provide the same gatekeeping function it serves in all cases. Quite simply, there is no such reasoning.

The Court of Appeals' approach is consistent with many other courts, and mimics the actual real estate market. It is also consistent with Kentucky's law on highest and best use. This Court should take this opportunity to adopt the Florida approach, perhaps the most explicitly articulated enumeration of the factors that play into evaluating unity of use. Some of these factors, however, merit additional discussion.

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[70] The Court of Appeals stated that the circuit court should have used the following factors: (1) how the subject property was being used at the time of the taking; (2) whether the subject property had ever been devoted to a separate use; (3) the highest and best use of the subject property. Opinion at 14.

C. To evaluate unity of use, a court must analyze the highest and best use of the properties as joined and as separated; the configuration that produces the greater value anchors the unity of use determination.

It is undisputed that a condemnee is entitled to receive just compensation based on the "highest and best use" of the affected property. The "highest and best use" of a property is "the reasonably probable use of property that results in the highest value." The Appraisal of Real Estate, *supra* at 332. To test whether a condemned parcel achieves its highest and best use alone or combined with other parcels, an appraiser – and a trial court – must evaluate the highest and best use of both: the parcel alone, and the parcel as combined.[71] As between integrated or segregated, the use that produces the higher unit value (e.g. a higher dollar amount per acre or per square foot) is the legal highest and best use. This concept was discussed and adopted by the Wisconsin Supreme Court:

> [W]hen the property's "highest and best" use that affects its present market value is most appropriately appraised by considering the contiguous tax parcels separately, that is the appropriate appraisal method. Conversely, when, according to the above-addressed rules, the "highest and best use" is more adequately represented through an appraisal of the property as a single unit, that approach is the one that is appropriate.

Spiegelberg v. State, 2006 WI 75, ¶ 31, 291 Wis. 2d 601, 621, 717 N.W.2d 641, 650-51.

The Supreme Court of Arizona has said essentially the same thing.

> In summary, the determination of whether the land taken should be valued separately or as part of the whole is based on a determination of the highest and best use of the land. Where the part taken has a market value based on a separate economic use and commands a higher value as a separate entity than as a part of a larger tract, such value has been allowed. Conversely, the highest and best use of the part taken may be so related to its use with the entire property that the value of the part taken is dependent upon the value of the entire tract.

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[71] This is the same analysis Spence presented in his appraisal report.

State ex rel. Ordway v. Buchanan, 154 Ariz. 159, 163, 741 P.2d 292, 296 (1987). See also, *City of Phoenix v. Wilson*, 200 Ariz. 2, 8, 21 P.3d 388, 394 (2001) (highest and best use drives unity of use determination). Now is the time for the Supreme Court of Kentucky to acknowledge this concept as well.

The definition of highest and best use explicitly includes reasonable probability. An appraiser – and a trial court – must consider more than just the "as is" status of the property. They must also consider the reasonable probability of all elements of highest and best use, which includes physical possibility, legal permissibility, financial feasibility, and maximal productivity. The Appraisal of Real Estate, *supra* at 332. In other words, to determine highest and best use, you must consider more than just current use. So, to determine whether certain parcels should be unified, you must also consider more than just current use. This is exactly what the Court of Appeals held.

A similar frame of reference to the highest and best use applies for evaluating the economic interdependence of the multiple parcels. A severed portion of land can only be valued without reference to the remainder when it can stand alone "as an independent economic unit..." *State v. Windham*, 837 S.W.2d 73, 76 (Tex. 1992). If a property achieves its highest unit value by use alone, that approach should govern. On the other hand, if the property achieves its highest unit value in combination with contiguous parcels, *that* approach should govern. Montague, *supra* at 143-44. See also, *Nichols* § 14B.03[2] (economic value is the "touchstone" of unity analysis).

Determining whether a severed property can stand alone as an independent economic unit necessarily involves determining the highest and best use of the severed property alone *and* determining the highest and best use of the property as part of the

larger parcel. In either event, the appraiser – and thus the court – would not and cannot simply consider the current use of the property. Highest and best use involves examining reasonable probabilities, i.e. more than just actual use. Evaluating economic dependence works the same way.

It is beyond dispute that, under eminent domain law, the value of a property is not contingent on its current use. *Barnes*, 147 S.W.3d at 753. It should also be beyond dispute that determining whether a property is part of an integrated whole (or separate) *also* is not necessarily contingent on its current use, since both necessarily involve an investigation of highest and best use. So, the Court of Appeals merely said what should be self-evident: to determine whether one property should be considered unified in use with a neighboring parcel, a court must consider the highest and best use of both the smaller and unified parcels, and thus consider more than just current use.

II. As the Court of Appeals held, the trial court erred in evaluating unity of use by being solely focused on the current use of the property by one tenant.

In an attempt to revise the record, the District claims that the trial court considered "all of the relevant factors" when it evaluated unity of use. Br. at 9. Notably, the District fails to explicitly state what these relevant factors are. There is no doubt that the trial court "considered how the property was being used at the time of the taking..." Br. at 9. The Court of Appeals' problem with the circuit court's analysis was not that the trial court analyzed this factor; it was that the trial court analyzed this factor to the exclusion of all others. Let us turn to the record.

The full extent of the trial court's analysis of unity of use is seen in its Conclusions of Law No. 4. In that paragraph, the trial court relied on one tenant, Wagner,

to support the idea that the Part Taken was not being currently used to support the Remainder.[72] This piece of evidence is solely focused on one tenant, and current use.

Not only was this singular focus on the current tenant erroneous, but it was also far from determinative and showed the flaws in the trial court's reasoning. Focusing on one tenant necessarily isolates the inquiry not to the market, but instead to one use. And it narrows the inquiry to one user at one point in time, ignoring future market probabilities. As the Court of Appeals pointed out, "Wagner admitted that another user with a larger operation would need to use the [Part Taken] if it planned to fully utilize the Large Tract as a warehousing or manufacturing facility and that under those circumstances, it would be essential for that user to have the use of the [Part Taken]." Opinion at 15. This shows the fallacy of linking unity of use to a present tenant. Tenants come and go. Tenants' uses expand and contract. A tenant is one user in time out of potentially many. One tenant's limited use of a property does not correlate to the highest and best use of the property.

In the same paragraph, the circuit court claimed that there was no evidence that the Part Taken had been used to support the Remainder from 1980 to the present. This was clearly untrue.[73] But this statement by the circuit court, while framed in a historical

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[72] The District also claims that the trial court found that the Part Taken was not "needed" for the Remainder to continue its warehouse use. Br. at 10. This obfuscates the point. Even Spence noted that the highest and best use would be warehousing after the taking. The issue, however, was that, without the Part Taken, the rents (and thus the value) that the Remainder could receive for warehousing were considerably less (about half) than the rents it could receive before the taking. This diminution of value proved that the Part Taken was an integrated economic unit with the Remainder.

[73] Spence testified that the Part Taken was necessary to support the highest and best use of the Subject Property as a warehousing facility because large semi-trucks needed the Part Taken to maneuver, and to unload (and pick up) materials. Tr. 56:20-58:4. Spence also testified that there were even photos on Google maps showing semi-trailers parked on the Part Taken. Tr. 57:23-58:4. Spence also testified that, historically, the two parcels were used together. Tr. 56:20-58:4.

context, again only considers the *present* use of the property.[74] It does not consider the *reasonable probability* of the integration of the Part Taken and the Remainder by a seller or a buyer. It also does not examine *any* of the factors beyond current use that courts and commentators deem relevant to this inquiry, e.g.: the intent of the owner, the adaptability of the property, the dependence between parcels, the highest and best use of the property, zoning, and the appearance of the land. See *Jirik*, 471 So. 2d at 554-55.

Putnam will acknowledge that Wagner, one tenant of Putnam's, had no use for the Part Taken in his operations. So what? Wagner's commercial activities are irrelevant. The focus of inquiry is on the value of the entire real estate, not on the individual business activities of one tenant. And Wagner also acknowledged that if he had more business, the Part Taken would be "essential" to operate the Subject Property efficiently.[75] The focus of an eminent domain trial is just compensation for the *real estate*, which is taken forever. The isolated activities of one tenant (of several) are not dispositive of the value of the real estate.

Highest and best use is not dictated by the current user. Instead, highest and best use is dictated by the market. Highest and best use in the appraisal industry has been defined as "the reasonably probable use of property that results in the highest value." The Appraisal of Real Estate, *supra* at 332. The four elements of highest and best use which an appraiser tests are: (1) legal permissibility; (2) physical possibility; (3) financial feasibility; and (4) maximum productivity. *Id.* at 335. Note that "current user" is not in

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[74] The District also points to several other items that are mere repetitions of present use and character of the Part Taken, e.g. the chain link fence, the lack of improvements, the *existing* warehouse use. These are not additional analyses, but items that pertain to the same present use factor. The trial court also did not include these items in its analysis, but mentioned them elsewhere in its decision. The District is attempting to impart an analysis to the trial court that the trial court itself did not conduct.

[75] Tr. 27:17-28:2.

the definition or the test factors. Spence analyzed and tested all of these four factors to determine highest and best use under accepted appraisal practices and the law. An appraisal, which does not include this analysis and uses the wrong highest and best use, "will be wrong from the very start." Tr. 52:6-52:8. The current user is essentially a non-issue.

The District claims that the trial court analyzed the "reasonable likelihood" that the highest and best use of the Part Taken was as a separate tract. Br. 13. The District simply has no basis in the record to support this statement, and provides no citation to support it. Examining the same record, the Court of Appeals found that "Putnam offered proof from Spence that the value of its properties as a whole was permanently diminished by the taking." This shows a unified highest and best use and a permanent economic detriment to the Remainder. The Court of Appeals called this a "*prima facie* showing...that the taking caused it to suffer a permanent injury as related to its remaining property." So, what did the District offer to counter this evidence? Nothing. As the Court of Appeals put it, "The District failed to rebut Spence's testimony [regarding the diminution of value of the Remainder] with any expert opinion of its own."

Even assuming the trial court did analyze the "reasonable likelihood" that the highest and best use of the Part Taken was as a separate tract, it would have had no evidence on the record to side with the District. The record shows unambiguously that the trial court considered no evidence, other than present use, when it made its unity of use determination. The Court of Appeals held this was clear error. This Court should hold the same. In so doing, this Court should enunciate those factors a trial court *should* consider in making a unity of use determination, including the intent of the owner, the adaptability

of the property, the dependence between parcels, the highest and best use of the property, zoning, the appearance of the land, and finally, the actual use of the land.

III. The Court of Appeals did not alter the tests for highest and best use at all.

We must jettison the District's unsupported and undeveloped thematic attack that Putnam's valuation was flawed because it was "pretend" "myth" or "fantasy" involving an "unknown investor" to purchase the Subject Property or the Part Taken. Eminent domain necessarily involves valuing a property where there is neither a willing seller nor a traditional buyer.

A. In eminent domain, there is no possibility of an actual buyer or seller, so reasonable probabilities of market actions are properly proved by expert testimony supported by market data.

As in all condemnations, the District seized the Part Taken "*in invitum*, that is to say, against the consent of the owner." *State Highway Dep't v. Meeker*, 294 P.2d 603, 605 (Wyo. 1956). There is thus neither an actual willing buyer nor an actual willing seller. The "ready and willing" buyer in eminent domain is a long recognized legal fiction, that nevertheless "serve[s] a useful purpose in working out justice." *United States v. Jamerson*, 60 F. Supp. 281, 285 (N.D. Iowa 1944).

An appraisal, after all is an *opinion* of value. The market value that an appraisal opines is only necessary because there is no market sale of the property. The District's condemnation prevented any market sale of the Part Taken or the Subject Property as a whole. Any appraisal thus must envision a "mythical" buyer or investor by examining market data. An eminent domain appraisal must envision the fictional (but necessary) willing buyer because there is no true, arms-length sale of the condemned property.

Spence's "mythical" buyer is culled from market data and is a necessary component of any eminent domain case.

The District seems to argue that a condemnee must produce evidence of *actual* buyers or *actual* investors for the condemned property. This legal standard is a ridiculous standard unsupported by law or logic.

A condemnee could only produce evidence of actual buyers or actual investors if, at the time of condemnation, the property was being marketed for sale *and* had been marketed long enough to actually generate an interested party.[76] This improbable confluence of events would occur in so few cases as to create a legal hurdle that nearly no condemnee could satisfy to present their case for just compensation.

The District also cites no law that requires a condemnee to produce actual buyers or investors as a legal or evidentiary standard for just compensation or highest and best use. And how could there be such a law? What is the likelihood that a condemnee will be able to produce as witnesses potential buyers or investors *after* a property has been condemned? No buyer will ever emerge for a property targeted for government acquisition or for a property that has already been condemned.

Fair market value under Kentucky eminent domain law is "the price that a willing seller will take and a willing buyer will pay for property, neither being under any compulsion to sell or buy and both being in possession of all relevant information regarding the property." *Commw. v. R.J. Corman R.R. Co./Memphis Line*, 116 S.W.3d 488, 491 (Ky. 2003) [quotation omitted]. Obviously, this legal standard does not require production of a willing buyer anymore than it does production of a willing seller. There is

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[76] Presuming such a buyer existed, the District would likely be arguing the buyer was speculative without a purchase agreement or contract.

no willing seller because the property is being taken by force. Not only is it extremely unlikely that any buyer would emerge on a property targeted for condemnation, if a buyer improbably *did* emerge after the condemnation was initiated, the offer would be inadmissible. See *Nichols* § 12B.04 ("if the offer is received after filing the condemnation petition, it is inadmissible") and *Nichols* § 21.03[2] ("Offers received after the filing of the condemnation petition have been found inadmissible..."). It is a well-worn matter of law that, for purposes of determining fair market value, the willing buyer and the willing seller are hypothetical persons, rather than specific individuals or entities.[77]

If condemnees must produce evidence of *actual* buyers willing to invest in a property, then the District must produce evidence that a willing seller would accept the pittance the District offered to Putnam. Quite clearly, the legal standard the District proposes is one-sided, impossible, likely inadmissible, and a fundamental redefinition of market value under Kentucky eminent domain law. The Court of Appeals correctly ignored this nonexistent standard.

The standard for just compensation is market value. Appraisers, courts, and juries can calculate and determine market value without reference to an actual buyer. In fact, they already do. No actual buyer is required or even possible.

B. Putnam properly proved highest and best use through expert testimony.

The District is wrong when it claims that Spence relied on "unknown" demand for warehousing in Puducah. Spence analyzed the financial feasibility of the property "as

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[77] *Estate of Jameson v. C.I.R.*, 267 F.3d 366, 370 (5th Cir. 2001); *United States v. Douglas*, 207 F.2d 381, 384 (9th Cir. 1953); *Westchester Cty. Park Comm'n v. United States*, 143 F.2d 688, 692 (2d Cir. 1944); *In re Dissolution of Midnight Star Enterprises, L.P. ex rel. Midnight Star Enterprises, Ltd.*, 2006 S.D. 98, ¶ 20, 724 N.W.2d 334, 338; *In re 3dfx Interactive, Inc.*, 389 B.R. 842, 882 (Bankr. N.D. Cal. 2008).

improved," i.e., with the industrial improvements on the Remainder. Spence Appraisal at 36. After analyzing market trends for this type of property, Spence concluded that its continued use was feasible. On the other hand, the District never produced any evidence concerning industrial or warehouse demand at all. If the District's brief was as full of citations to the record as it is with pejoratives, the District might have a case. But the District is simply, once again, arguing its points without supporting evidence or law.

An appraiser is a qualified expert in determining market demand for real estate. Spence was qualified as an expert and his appraisal was admitted into evidence. The District's criticisms on market demand are empty laments with no support in the record.

The District is flat wrong when it argues that Putnam did not offer evidence that the Part Taken was necessary to support the Subject Property. Spence's expert appraisal, admitted into evidence, is evidence that the Subject Property achieved its highest and best use when the Remainder was combined with the Part Taken. Diminution of value of the Remainder after the taking is proof positive of unified use.

The District is either obsessed with the current use of the Subject Property or attempting to obfuscate the law. The District is wrong on the facts when it attempts to testify that the Part Taken is not unified in use with the Remainder. The District cites to no evidence to support this claim. There is a reason it cites to no evidence. There is no such evidence. And furthermore, the *use* that matters is not *current* use.

The just compensation to which condemnees are entitled is a value based on highest and best use, which can be different from current use. Once a party introduces highest and best use evidence by a competent expert, the fact finder must weigh that evidence, and it is the duty of the opposing party to rebut it. *Baston v. Cnty. of Kenton ex*

rel. Kenton Cnty. Airport Bd., 319 S.W.3d 401, 407-08 (Ky. 2010). Spence testified that, under the Subject Property's highest and best use, the Part Taken and the Remainder were unified. This opinion was admitted into evidence. Spence is the only party to opine on the value or highest and best use of the Subject Property as a whole.

Putnam will concede that it had a burden to show that the highest and best use was something other than the current use. Putnam satisfied this burden by having an appraiser analyze the Subject Property as a whole and the Part Taken individually. That appraiser, Spence, determined and testified that the Subject Property as a whole had a highest and best use as unified. On the other hand, the District presented no evidence analyzing whether the Remainder and Part Taken achieved their highest and best use together or separately. The District simply assumes this fact without supporting evidence or analysis. Again, the District relies on nothing more than the unsupported arguments of counsel. If the District wanted to challenge the highest and best use of the Subject Property vis-à-vis the Part Taken, then the District was obligated to introduce evidence analyzing the two. See, *Commw., Dep't of Highways v. Sea*, 402 S.W.2d 842, 843 (Ky. 1966) ("either party may develop the question of what is the 'highest and best use' of the property involved; and, of course, the other party may take a different view and *introduce evidence to the contrary*." [emphasis added']). Where one party does not introduce evidence of the highest and best use of the entire larger parcel, it can be assumed that the parcel should be valued as a single unit. *Id.*

C. Spence's adjustment to account for the leaking roof was supported by market data and was an adjustment to account for a physical condition, not a precondition to highest and best use.

Although not explicit, the District opaquely argues that the trial court could not have found a unity of use because the trial court did not believe Putnam's highest and best use. First, the trial court did not say this, so again, the District is arguing something with no basis in the record. The only thing the trial court said about highest and best use was that it was "warehousing." Putnam's highest and best use for the Subject Property before, and the Remainder after were both warehousing.

Second, the District attempts to tie the roof fix to a realization of the Subject's highest and best use. This is again a fabrication of the evidence. Fixing the roof does not drive highest and best use. Fixing the roof merely adjusts for differences in comparables *after highest and best use is already determined. See*, The Appraisal of Real Estate, *supra* at 379-80 ("[A]n adequately supported determination of the subject property's highest and best use provides the basis for the research and analysis of comparable sales…"). The roof fix is a condition adjustment to comparable sales. *See*, The Appraisal of Real Estate, *supra* at 412-13 (A knowledgeable buyer will consider costs to cure deferred maintenance because such costs affect the amount a buyer is willing to pay. Appraisers may adjust for this as an "expenditure made immediately after purchase"). It is not a precondition to highest and best use.

Spence's highest and best use – indeed the trial court's highest and best use – was for warehousing. The issue, then, is whether the Subject Property would achieve a higher value with the Part Taken and the Remainder being used in conjunction with each other for warehousing purposes. Sirk never even studied this possibility. Spence did. He found

that warehouses with ample room to maneuver large semi-trucks commanded higher rent, higher income, and higher sales prices.[78] With the Part Taken, the Subject Property possessed those same characteristics. It was thus physically possible, financially feasible, legally permissible, and maximally productive to use the Part Taken with the Remainder. These are the four factors of highest and best use. The Appraisal Institute, *supra* at 335. The roof has nothing to do with this calculus.

The District claims that "Putnam's expert argued that an investment of $400,000.00 would make the warehouse building a viable and fully functioning warehouse facility which would need the space provided by the [Part Taken] to aide in its operations[,] and thus give a 'unity of purpose' to the properties that did not exist before." This is a flat out fabrication of the evidence. Spence did not assume a roof fix was necessary to show a unity of the parcels. Spence accounted for the roof fix as a discount to reflect a difference between his comparables and the subject improvements.

There is no hiding the fact that the roof leaked. A buyer would account for that. As Spence wrote in his appraisal, "The amount of $400,000 is based on the amount of capital outlay required to get the improvement in a position to *compete for rental rates* and overall market value." Spence Report at 59 [emphasis added]. In other words, to get the same rents and market value as Spence's comparables, Spence noted the roof would

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[78] *See e.g.*, Tr. 72:18-72:21 (to determine highest and best use as improved, he "looked at other competing properties and their layout and their balance between the improvement and the layout of the land, [and] how they functioned as a integrated unit."); Tr. 85:20-85:23 ("when land becomes an important issue, [the Remainder] cannot compete with the highest priced property. It is dependent upon that 2.97 acres [i.e. the Part Taken] to compete and stay in value with where it's going."); Tr. 86:10-86:17 ("You need that [i.e. the Part Taken]...because that's part of their income. These facilities will charge, like the North America Van Line, a certain amount of money for [cargo] to be dropped on their storage lot to be picked up by another North American Van Line truck. So it's money. That site looks to most people like a vacant site. But to that facility, it's an income producer.").

have to be fixed. Spence further noted that the investment in the roof could (and likely would) be phased over time and could potentially be cheaper than the $400,000 he allocated. A buyer, however, would account for this needed investment (perhaps over time), which Spence acknowledged by subtracting that $400,000.

D. Spence appropriately adjusted for the roof and his comparable sales, and the District has no evidence showing otherwise.

The District frames the buyer (a necessary legal fiction) and the demand for the continued use of the property as "unlikely contingencies." The District has no evidence that these contingencies are unlikely or otherwise. By contrast, Putnam presented market evidence of the highest and best use of the property and the resulting value.

The District claims that Spence's value was "artificially inflated" because Spence used buildings of "much higher quality." First, the District once again has no evidence that Spence's comparables were of superior quality. Second, the District has no evidence that shows (or even suggests) that Spence did not appropriately adjust for the differences between his comparables and the Subject. The District insinuates – again without evidence – that the Part Taken is locationally different from Spence's comparable sales. Assuming they were, Spence appropriately adjusted for those locational differences. Ex. 2 at 63-65. As Spence indicated, he made location adjustments for his Part Taken sales 1, 3, 4, 7, and 8. Ex. 2 at 69. Indeed, the District provided no evidence that Spence's adjustments were incorrect or unreasonable.

Third, the District has no evidence that Spence's $400,000 adjustment is not reasonable, accurate, or sufficient to account for differences in the comparables. This is simply the District arguing without supporting evidence. Spence also noted that, "if the

full amount of deferred maintenance is solved then the condition of the [Subject Property] would be *superior* to the rental and market comparables..." Spence Report at 59.

E. The District's hypothetical perversion of the highest and best use test ignores existing law, appraisal methodology, and the facts at bar.

The District worries of a perversion of the highest and best use test in condemnation actions. But the District's attempt at forecasting these problems is, itself, perverse. The District claims that a condemnee could value development land as if the land was already developed. This is an absurd analogy and not at all equivalent to the facts at bar. And, the District does not even attempt to explain how the facts in this case or the Court of Appeals' holding relates to an alteration of the standard highest and best use test. Making an adjustment for a deferred maintenance feature (a leaky roof in this case) has no analogy to developing a vacant parcel.

The District wants to frame this case as one of "fanciful" assumptions versus "reality." But the reality is this: the real estate market does not stop its analysis at the condition of the property at the time of sale. As the California Supreme Court has put it:

> Our recognition that the present value of property may reflect its development potential is nothing more than an acknowledgement of the realities of the marketplace. Those realities suggest that we acknowledge an economic fact: that contiguous property held in common ownership but devoted to separate uses may nonetheless be valued by the market for an integrated use.

Neumann, 6 Cal. 4th at 756, 863 P.2d at 737.

Here, the future actions are not even as complex as an entire development or a change in use, as was the case in *Neumann* (where the court nevertheless ruled the

property owner's combined valuation of the properties was proper). Putnam is not proving up a claim based on a development scenario. Spence is merely adjusting between the Subject Property (already improved) and his comparable sales (also already improved). The only difference is that, the roofs for Spence's comparable sales were in better condition than the Subject. So, Spence adjusted for that fact. This adjustment is not even remotely close to the District's suggestion, that vacant parcels should be valued as if already improved. The New Jersey case cited by the District, which addressed development of a vacant parcel, has no relevance to making an adjustment for a feature of deferred maintenance in an already improved property.

The standard for valuing a property is in its "as is" condition. This was addressed by the Superior Court of New Jersey:

> the State is required to pay for the building "as is," considering the reasonable probability of future renovations and approvals required to improve the property to its highest and best use, discounted by the risks and costs of such venture, just as a buyer would pay for the building in its current condition, then make any improvements necessary to bring the building to the buyer's desired use.

State ex rel. Com'r of Transp. v. 200 Route 17, L.L.C., 421 N.J. Super. 168, 179, 22 A.3d 1012, 1018-19 (App. Div. 2011). This is exactly what Spence did. He determined both his before value and after value using comparables that had functioning roofs. This is the objective that a reasonable prospective buyer would have for the subject property. But since the subject property did not have a functioning roof, Spence correctly deducted the cost that a prospective buyer would spend to fix the leaking roof on the subject property to make it equivalent to the comparables. Failing to make this adjustment would result in

an overstatement of value. The directive in *200 Route 17* demonstrates the appropriateness of Spence's analysis in this case.

IV. The Court of Appeals did not interfere with the province of the factfinder because in an eminent domain action, the trial court must award just compensation consistent with the law and the record; the trial court ignored both.

The District seems to suggest that, if a trial court's award of just compensation is within the range of appraisal evidence, an appellate court is handcuffed and has only the authority to rubber stamp the judgment. Br. at 17-18. This argument makes a mockery of the constitutional guarantee of just compensation and the role of our appellate courts. Deciding just compensation is not simply drawing a number out of a hat. "Deference" to the factfinder is merely a legal tool that recognizes that the factfinder is in the best place to make credibility determinations. It does not justify a trial court ignoring the rules of evidence or the rule of law. It also does not prohibit the appellate court from insuring that the trial court bases its decision on the actual record.

A. Where an award of just compensation is premised on legal errors, it must be reversed irrespective of whether it is within the range of evidence.

Not only must a trial court's decisions be supported by substantial evidence, they must be consistent with the law. Comparing this case to a jury is simply a hypothetical exercise and an attempt to forgive the demonstrable errors in law made by the trial court. "The rule of deference is not a mere device to gloss over prejudicial error committed by trial judges...." *State ex rel. State Highway Comm'n v. Heim*, 483 S.W.2d 410, 414 (Mo.

Ct. App. 1972). Beyond being within the range of proof, an award of just compensation must also be based on competent evidence. *Tyree*, 365 S.W.2d at 476.

The District cites to a First Circuit case interpreting Massachusetts law to note that, traditionally, trial courts are given deference as to their findings in eminent domain cases. Putnam does not disagree with this generalization. But we must be careful not to equate "deference" with absence of review. While the appellate courts afford some deference to trial courts on factual issues, trial courts must still base factual findings on the actual evidence in the record.[79] The trial courts are also still obligated to correctly apply the law. See *Jones-Swan v. Luther*, 478 S.W.3d 392, 394 (Ky. Ct. App. 2015) (an appellate court "afford[s] no deference to the trial court's application of the law to the facts found").[80] Where a trial court misapplies the law to reach an award, the award is not immune from scrutiny. A misapplication of the law renders an award null and void. The Court of Appeals – correctly – held that the trial court's award of just compensation was illegal because it was based on incompetent evidence *and* used a methodology that the trial court itself had previously rejected.

The trial court's award used a 2002 intraparty deed of all three Putnam properties to set market value in 2011. The Court of Appeals ruled that "a prior transfer between interrelated companies of a three parcel tract is [not] competent or reliable evidence of the present fair market value of a single parcel nine years later."

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[79] *Citizens Fid. Bank & Trust Co. v. Leake*, 380 S.W.2d 264, 266 (Ky. 1964).

[80] For application to eminent domain specifically, see also, *Trowbridge Partners, L.P. v. Miss. Transp. Comm'n*, 954 So. 2d 935, 938 (Miss. 2007) (trial court not entitled to deference where it misapplies evidentiary standards in condemnation case); *Sheridan Redevelopment Agency v. Knightsbridge Land Co.*, 166 P.3d 259, 262 (Colo. App. 2007) (in eminent domain case, factual determinations are entitled to deference, while legal questions are not); *Dep't of Transp. v. Fisher*, 958 So. 2d 586, 590 (Fla. Dist. Ct. App. 2007) (in eminent domain cases, a trial court's factual findings are entitled to deference, but its application of those facts to law is not).

The reason for disallowing sales that are distant in time is that the market for real estate changes over time. Beyond having logical appeal on its face, the Court's holding is merely an application of undisputed facts to pre-existing *law*.[81] In other words, the deed is incompetent evidence as a matter of law, not because of any dispute as to the facts surrounding the deed. This is a legal determination the Court of Appeals (or this Court) is free to (and expected to) make.

Moreover, changes in time as it affects market value must be developed by expert testimony. *Robinette v. Commw., Dep't of Highways*, 380 S.W.2d 78, 82 (Ky. 1964). The District presented no evidence that the 2002 deed represented market value nine years later, on the date of taking (or ever). Indeed, the record is devoid of such evidence, meaning the trial court's finding is again clearly erroneous. The District introduced the 2002 deed without any testimony or comment. Since it does reflect ownership history for the subject property, it is relevant for that limited purpose. Without any additional testimony, the deed reflects nothing more than what is written on the document. The trial court's findings and conclusions about the deed go beyond anything contained in the deed itself. Without testimony to support those findings and conclusions (and there was

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[81] See *Commw. v. Combs*, 17 S.W.2d 748 (Ky. 1929) (holding that admission of testimony as to amount of sale of lots under different circumstances eight years prior to trial of a condemnation action was clear error); and *Commw., Dep't of Highways v. Dillon*, 525 S.W.2d 658, 659 (Ky. 1975) (non-arms length transactions are presumed not to represent market value). Kentucky's sister courts have excluded sales of *both* comparables and the subject property when the sale is distant in time. *Miller v. Glacier Dev. Co.*, 284 Kan. 476, 492, 161 P.3d 730, 742 (2007) (purchase price of subject property seven and eight years before date of taking irrelevant and inadmissible); *Bern-Shaw Ltd. P'ship v. Mayor of Baltimore*, 377 Md. 277, 289, 833 A.2d 502, 509 (2003) (sale of subject property 18 years before date of taking irrelevant and prejudicial); *Commw. v. Fox*, 16 Pa. Cmwlth. 23, 31, 328 A.2d 872, 877 (1974) (sale of subject property four years before date of taking properly excluded); *Tenn. Gas Transmission Co. v. Mattevi*, 144 N.E.2d 123, 126 (Ohio Ct. App. 1956) (sale of subject property nine years before date of taking held properly excluded); *State ex rel. State Highway Comm'n v. Bowling*, 414 S.W.2d 551, 554-55 (Mo. 1967) (sale of subject property eight years before date of taking legally incompetent).

none), those findings and conclusions are clearly erroneous. Putnam could not have objected to using the 2002 deed to set market value because no attempt to introduce such evidence was ever made. The only evidence on the record about the value associated with the 2002 deed as of 2002 (or ever) was Putnam's testimony that the deed represented only *half* of market value in 2002.

The District is once again misrepresenting the record when it claims that there is no evidence that the value of the Subject Property increased from 2002 to the date of taking. Spence's appraisal of the Subject Property *is* evidence that, even if the market value of the Subject Property was $550,000 in 2002, it had increased to $1,100,000 by 2011. In a half-hearted attempt to prove that market conditions did not change between 2002 and 2011, the District relies on Wagner's testimony that he was not aware of any roof repairs since 2007. Wagner is not an appraiser and is not qualified to opine on changes in the real estate market. And, the roof is only one element of market value and Wagner did not testify (nor could he) how this lack of repair would have affected the value of the Subject Property between 2002 and 2011. The District's attempt to introduce a trend of market evidence is too little, too late.

The "sworn" nature of the deed is irrelevant. It is still nine years old, unconnected to the date of value, between related parties, and sets the value for *three* parcels, not one. The deed was incompetent evidence as a matter of law. This Court should not reverse prior precedent on these settled issues.

Beyond using incompetent evidence, the trial court used a methodology that the Court of Appeals called "perplexing." Opinion at 16. The methodology was perplexing because "the circuit court stated in its opinion that it did not believe the Subject Property

was unified...[but] nevertheless valued the property as if [it] were unified." Opinion at 16. The before-and-after analysis is only appropriate where the properties are unified in use such that the remainder will suffer severance damages. *Bianchi*, 274 S.W.3d at 372.

The 2002 deed was for all three parcels. If the trial court truly believed that the Part Taken should be valued in isolation, then the value of all three parcels was "irrelevant" once the trial court came to this conclusion. Opinion at 16.

Although *Bianchi* arguably resolves this issue, the Supreme Court of Arizona has dealt with this issue squarely. "If the property taken has a market value as a separate and independent economic use and could therefore command a higher value as a separate entity, this value must be considered *without resort to the value of any tract from which it was severed.*" *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 162-63, 741 P.2d 292, 295-96 (1987) (citing *Arizona State Land Dep't*, 113 Ariz. at 128, 547 P.2d at 482; 4A Nichols on Eminent Domain, § 14.06, at 14–150) [emphasis added]. The trial court here used precisely that impermissible method: using the value of the larger parcel in an attempt to value the smaller, allegedly independent parcel.

Because the trial court's award used incompetent evidence and a logically inconsistent methodology, the Court of Appeals was not bound to accept it and rightly vacated the award. Such illegal awards are not entitled to the "deference" typically placed on findings of fact. The Court of Appeals did not invade the province of the factfinder. It corrected errors of law, which is the classic province of the appellate court. By noting the many flaws in the trial court's method, the Court of Appeals necessarily held that the trial court's award was "palpably wrong."

B. Courts cannot be compared to juries because courts must make specific, written findings of fact that must be supported by the record.

As a starting point, this case was *not* submitted to a jury. Courts have a higher burden than juries in that they must make specific findings of fact. *See* CR 52.01 ("in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically...."). The trial court has a greater obligation than simply picking a number between the appraisers. The award must also be supported by the evidence. *Pierson v. Commw.*, 350 S.W.2d 487, 489 (Ky. 1961). If the award is not supported by the evidence, then its place within the range of expert testimony is irrelevant.

In a bench trial for a condemnation, this Court reviews factual findings under a clearly erroneous standard. *Clark v. Bd. of Regents of W. Kentucky Univ.*, 311 S.W.3d 726, 729 (Ky. Ct. App. 2010); *God's Ctr. Found. Inc. v. Lexington–Fayette Urban County Gov't*, 125 S.W.3d 295, 300 (Ky.App.2002). Factual findings are clearly erroneous if they are not supported by substantial evidence. *God's Ctr. Found.*, 125 S.W.3d at 300. "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Id.*

C. The trial court had no evidentiary basis in the record to reject Spence's valuation of the Part Taken as a separate unit.

Keeping in mind that a trial court's findings must be supported by the record, let us turn to an issue that Putnam raised before the Court of Appeals, and the District raises again before this Court: the trial court's out-of-hand rejection of Spence's valuation of the Part Taken. Besides concluding to a value based on the before-and-after method, Spence also opined as to the value of the Part Taken, if the Part Taken was to be valued

in isolation. The trial court found that Spence's opinion of value for the Part Taken was "extravagant." To avoid this Court labeling this finding as clearly erroneous, this finding would have to be supported by "substantial evidence." So, on what evidence in the record did the trial court rely to make this finding?

The trial court rejected Sirk's appraisal outright because "Sirk's comparable sales are not persuasive because they were non arms-length transactions (or even sales at all) or they involved properties where the highest and best use was not the same high level of commercial use that is enjoyed by the [Part Taken]." Conclusions of Law ¶ 11. The trial court flat out rejected Sirk's analysis because he attempted to use misleading transfers, non-sales, and properties so different in use that the court rejected them as a matter of law. That is an appropriate analysis reflected in the actual record.

Now let us examine why the trial court rejected Spence's valuation of the Part Taken. The trial court determined that the Part Taken's highest and best use was commercial. Conclusions of Law ¶ 11. Spence presented evidence of industrial, vacant land sales ranging, after adjustment, between $163,710.78 and $381,634.05 per acre. Ex. 2 at 63-69. Spence selected three sales that were most comparable to the Part Taken, with adjusted values of $306,226.80, $316,901.41, and $163,710.78 per acre. The trial court said nothing about any of these comparable sales. After analyzing all of the foregoing data, Spence selected a conservative value of $217,800 per acre, or $5 per square foot.

Spence also presented evidence of current, industrial and commercial vacant land listings around Paducah. Ex. 2 at 77. All of the commercial listings had values in excess of $5 per square foot. *Id.* Again, the trial court said nothing about these commercial listings that shared the same highest and best use as the Part Taken.

Instead of analyzing Spence's comparable sales or competitive listings, the trial court simply dismissed Spence's entire Part Taken valuation as "extravagant" or "far too high." Conclusions of Law ¶ 10. The trial court had previously rejected Sirk's sales because they were misleading and uncomparable. So, based on what evidence did the trial court reject Spence's comparable sales? None. No evidence at all. The trial court instead relied on "the Court's general knowledge and experience." Conclusions of Law ¶ 10. The trial court's "general knowledge and experience" is not evidence. It is not on the record. Putnam cannot cross-examine the judge nor present rebuttal evidence to the trial court's general knowledge because there is no way to know what that is.

Furthermore, at trial, the trial court candidly acknowledged that it did *not* have general knowledge and experience in property valuation or appraisal methodology. Tr. 159:22-159:24. The court was patently confused by whether there had to be an actual buyer (obviously, there cannot be in a condemnation), and differentiating between the highest and best use of the Subject Property, as a whole, and the Part Taken in isolation. Tr. 159-175. This is not an area of inquiry where "general knowledge" will suffice. If it were, there would be no need for expert witnesses to aid the court.

The evidence, admitted into the record, showed that commercial, vacant land sold for approximately $5 per square foot. The trial court had no evidence whatsoever to contradict that fact. The trial court had no basis in the record – to say nothing of substantial evidence – to sustain its "extravagance" finding. The trial court did not rely on Sirk's comparable sales at all. The trial court's finding that Spence's valuation of the Part Taken is "extravagant" or "too high" is thus clearly erroneous. While the Court of Appeals did not address the propriety of the trial court's actions here (it had already

decided to vacate the judgment), this Court can address it, considering Putnam raised it before the Court of Appeals and the District raises it again now. Courts can certainly use their powers of reason and *general* knowledge to come to informed decisions. But they cannot simply sweep away unrebutted expert evidence with no explanation or supporting evidence whatsoever.

The District cites to *Tyree* to justify its stance that a trial court need not explain its rejection of unrebutted expert evidence. When we understand *Tyree*, though, we see that it actually stands for just the opposite. *Tyree* is a failsafe provision for courts to reject verdicts that are so excessive or so inadequate that they "shock the conscience" of the court, and indicate that the verdict is "unsupported and could only have been rendered as the result of passion, prejudice or some other improper factor." *Commw., Dep't of Highways v. Friend*, 500 S.W.2d 405, 406 (Ky. 1973) (citing *Tyree*, 365 S.W.2d 472). The court can only sweep away a verdict where it is in "excess of any amount the evidence reasonably could sustain" and the evidence relied on to find the verdict "could not reasonably, rationally and logically produce such values." *Tyree*, 365 S.W.2d at 478. *Tyree* exists to insure that jury verdicts are supported by the record. It is not authority for judges to ignore the record.

It must be noted that the instant case is not a *verdict*. In other words, this is a court exercising its role as a factfinder in the first instance, not as a safeguard on the actions of a jury. It is unclear that the safeguard function of *Tyree* would even apply where the trial court was sitting as factfinder in the first place.

Furthermore, the "shock the conscience" concept as a failsafe for inadequacy has its roots in courts of equity.[82] Here, there was no evidence that Spence's sales data or analysis was "unsupported." And in a condemnation trial, evidence of other sales is hardly prejudicial or improper. Perhaps most importantly, the trial court did not exercise this "shock the conscience" power in its equitable capacity. Instead, it improperly wielded this power in its role as factfinder under the law, purportedly as part of its evaluation of the evidence. The court's equitable power does not extend to weighing evidence that has already been admitted to the record to calculate legal remedies.

It would seem, then, that a trial court could only wholly disregard admissible, unrebutted valuation evidence where it is not "reasonable, rational, or logical," or where its conclusion cannot be sustained by the included evidence, or where it is influenced by passion, prejudice or some other improper factor. None of this is present here. Spence presented unrebutted sales of actual real property. The trial court did not hold that Spence's analysis of that data was unreasonable or illogical or based on prejudicial factors. And how could it? There is no evidence in the record that Spence's analysis was any of these. The trial court simply dismissed all the undisputed data and the analysis as "extravagant" based on nothing at all. The determination of just compensation by a trial court is a legal remedy, guaranteed under the constitution. While courts can be fluid in

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[82] See e.g., *Gelfert v. Nat'l City Bank of New York*, 313 U.S. 221, 232, 61 S. Ct. 898, 902, 85 L. Ed. 1299 (1941) ("equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience..."); *In re Wolverine, Proctor & Schwartz, LLC*, 447 B.R. 1, 44 (Bankr. D. Mass. 2011) (evidence must shock conscience of court to trigger equitable remedies); *Schafer v. Helvering*, 83 F.2d 317, 320 (D.C. Cir.1936), *aff'd*, 299 U.S. 171, 57 S. Ct. 148, 81 L. Ed. 101 (1936) (wrongs must "shock the conscience of a court before a court will exercise equitable powers); *Mimica v. Area Interstate Trucking, Inc.*, 250 Ill. App. 3d 423, 431, 620 N.E.2d 1328, 1335 (1993) (a cause of action seeking to void a contract is one of equity, and must show evidence that shocks the conscience of the court); *McNinch v. Am. Trust Co.*, 183 N.C. 33, 110 S.E. 663, 666 (1922) (conduct that shocks the conscience of a court triggers resort to equity).

their determination of just compensation, it is not an equitable remedy. Dismissing admitted expert evidence on an equitable theory is thus an abuse of the trial court's discretion as a factfinder.

CONCLUSION & RELIEF SOUGHT

The trial court here committed myriad legal errors. It made a determination on unity of use looking only at the current use and based on one tenant. Trial courts must look to more factors than just current use in making this determination, most importantly highest and best use.

The trial court also used an illegal and illogical method to determine just compensation. After determining (wrongly) that the Part Taken and the Remainder were not unified, the trial court held that there was no reason to do a before-and-after valuation. Yet, the trial court then did just that. It used a 2002 deed to set the before value, and the sale of the Remainder to set the after value. This error alone mandates reversal.

Beyond using an illegal and inconsistent method, even the evidence the trial court used was incompetent as a matter of law. The trial court used a nine-year old, intraparty, non-sale deed to set the market value of the Subject Property in 2011. No one testified that this deed represented market value in 2011 or even in 2002. In fact, Putnam testified that the deed was only *half* of the market value, even in 2002.

And after using incompetent evidence, the trial court rejected probative evidence for no reason other than general knowledge, which the trial court admitted it did not have. The record is completely devoid of any reasoning or evidence that would call for the rejection of Spence's Part Taken valuation. The sales Spence used were real market data.

His analysis was supported and reasonable. No evidence refutes either of these. The trial court rejected it anyway, with no explanation whatsoever. The trial court's general knowledge does not extend to rejecting unrebutted expert testimony, nor does its equitable powers.

The mistakes the trial court made here are too drastic to ignore. Simply because the award lands between the range of evidence does not make this compensation "just." According to the U.S. Supreme Court, "just compensation" has a strict constitutional meaning and approximations do not suffice. The trial court's *ad hoc* remedy here is not just compensation and must be reversed. Considering the foregoing, the Court of Appeals should be affirmed and the matter remanded to the circuit court for proceedings consistent with the opinion of the Court of Appeals and this Court.

Date: 8-9-16

Dan Biersdorf - *Admitted pro hac vice*
Biersdorf & Associates, P.A.
150 South Fifth Street - Suite 3100
Minneapolis, MN 55402
612.339.7242